

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

not approved by [illegible]
74-1347, 1349

To be argued by
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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 74-1347, 74-1349

FRANCESCO COEDARO,

Plaintiff-Appellant,

—v.—

**RICHARD H. LUSARDI and
THE UNITED STATES OF AMERICA,**

*Defendants-Appellees and
Third-Party Plaintiffs-
Appellants,*

—v.—

CITY OF POUGHKEEPSIE,

*Third-Party Defendant-
Appellee.*

BRIEF FOR DEFENDANTS-APPELLEES AND THIRD-PARTY PLAINTIFFS-APPELLANTS

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BRIEF FOR DEFENDANTS-APPELLEES AND THIRD-PARTY PLAINTIFFS-APPELLANTS

Preliminary Statement

This is an appeal from the dismissal after trial of plaintiff's negligence suit against the United States of America ("Government") under the Federal Tort Claims Act, 28 U.S.C. §§ 2671 *et seq.* The Government has also cross-appealed from the dismissal of its third-party action for indemnification against the City of Poughkeepsie. (A. 1-3 *)

* References to the Appendix will be indicated by "A.", followed by the appropriate page numbers, except in the case of the trial transcript, which appears in its entirety at A. 47. Accordingly, references to the trial transcript will be indicated by "Tr." followed by page numbers.

Plaintiff Francesco Cordaro commenced a negligence action in New York State Supreme Court for Dutchess County against Richard Lusardi by the service of a summons on July 12, 1972. (A-21) The action was removed to the United States District Court for the Southern District of New York on August 25, 1972 pursuant to 28 U.S.C. 1442(a)(3), 1446 and 2679(d), upon the certification by the United States Attorney that the defendant federal employee was acting within the scope and in the course of his employment at the time of the accident which formed the basis of the action. (A-20).

On September 26, 1972, the Government moved to substitute the United States of America as the party-defendant, and to dismiss the complaint pursuant to Rule 12(b)(1) and (6), Fed. R. Civ. Proc. (A-25). The grounds of the motion to dismiss were that on March 25, 1971, plaintiff had executed a release of all his claims against both the Government and the Government driver (Lusardi), pursuant to 28 U.S.C. § 2672; that plaintiff had failed to present his administrative claim to the Department of the Interior within two years of the time of the accident, as is required by 28 U.S.C. § 2401(b); and had commenced suit prior to either a rejection of the administrative claim by the Government or the expiration of six months from the Government's receipt of the claim, in contravention of 28 U.S.C. § 2675(a).

Plaintiff's counsel submitted an affidavit in opposition to both motions by the Government, denying that Lusardi was on Governmental business at the time of the accident, asserting that the administrative claim had been timely presented, and denying that the release was in satisfaction of the plaintiff's alleged personal injury claim. (A. 32) By order dated November 27, 1972, United States District Judge Murray I. Gurfein directed that a hearing be held to determine whether the matter should be remanded to state court. Following a hearing on December 26, 1972, Magistrate Martin D. Jacobs issued a report in which he

found that the Government driver was acting within the scope of his employment; he concluded that the United States should be substituted as party-defendant and that the District Court had jurisdiction of the case. (A. 22) Thereafter, on February 1, 1973, Judge Gurfein filed an opinion, adopting the findings of the Magistrate and granting the first branch of the Government's motion,* but denying the motion to dismiss. (A. 38) In essence, the District Court held that triable questions of fact had been raised concerning the timeliness of the administrative claim and the effect to be given the release.

In its answer filed on April 26, 1973,** the United States conceded that a collision had occurred between vehicles driven by plaintiff and the Government driver, but denied Lusardi's negligence. (A. 9) In addition, the Government pleaded the following affirmative defenses: (1) the untimeliness of the administrative claim, (2) the prematurity of the action, (3) the release, (4) plaintiff's contributory negligence, and (5) negligent conduct by the City of Poughkeepsie as a promixate cause of the accident. Specifically, it was alleged that:

"Because of the negligence of the City of Poughkeepsie in the arrangement and placement of its traffic and parking signs on the north side of Harrison Street just east of Bement Avenue, Richard H. Lusardi was unable to see the stop sign at the intersection of the above-named streets until after he had entered the intersection on November 7, 1969, at the time of the collision * * * "

On the same date, the United States filed a third-party complaint against the City of Poughkeepsie, demanding

* While Lusardi is still listed in the caption of this case, he is no longer a party-defendant.

** The complaint, verified by plaintiff on September 5, 1972, was never filed in State or Federal Court. It was submitted as an exhibit to the Government's answer. (A. 9).

indemnification in the event that the United States were held liable in the principal action. The theory of the third-party action was expressed in the Fifth Affirmative Defense quoted above and was substantially repleaded in ¶ 9 of the third-party complaint. (A-13).

In its third-party answer, the City of Poughkeepsie asserted as its affirmative defense that the third-party complaint must be dismissed because of the Government's failure to comply with Section 200 of the Charter Laws of the City of Poughkeepsie, which provide in substance that the City "shall not be liable for the damage or injuries sustained by any person in consequence of any street, highway * * * in said city being out of repair, unsafe, dangerous . . . in any way or manner, unless written notice of the defective condition of said street shall have been given to the Superintendent of Public Works or the Superintendent of Streets of said city at least twenty-four hours *previous* to such damage or injury." (Emphasis supplied).

On the eve of trial, the Government moved to strike Poughkeepsie's affirmative defense on the ground that the quoted notice provision was inapplicable to the circumstances of the accident, or, if applicable, unconstitutional in its application.* Because of the disposition of the main

* In essence, the Government argued that the provision is unavailable as a defense to a third-party action, by analogy to the provisions in 28 U.S.C. § 2675(a) (inapplicability of administrative claim provisions of Federal Tort Claims Act to third-party plaintiffs impleading the United States) and § 50-e(1) of the General Municipal Law of New York (McKinney's), as construed in *Valstry Service Corp. v. Board of Education*, 2 N.Y. 2d 413, 161 N.Y.S. 2d 52 (1957); that it is inapplicable where the municipality itself created the hazard, *cf.*, *Doremus v. Incorporated Village of Lynbrook*, 18 N.Y. 2d 362, 275 N.Y.S. 2d 505 (1966); and that if § 200 of Poughkeepsie's Charter Laws were applicable in this suit, it would constitute an assertion of immunity to tort liability by a political subdivision of the State of New York already waived by the State. *Cf.*, *Bernadine v. City of New York*, 294 N.Y. 361, 365-366, 62 N.E. 2d 604 (1945).

action, the District Court never passed on the motion to strike. The liability issues in the case were tried to the court in one day on November 13, 1973. (Tr. 3) Judge Gurfein reserved decision on a motion to dismiss made at the close of plaintiff's case by both the Government and Poughkeepsie. (Tr. 77) On January 7, 1974, in an unreported Opinion containing his findings of fact and conclusions of law, Judge Gurfein ruled that the principal action should be dismissed because of the plaintiff's contributory negligence (A. 48). While he also found that the Government driver had been negligent, his opinion is devoid of any direction concerning the disposition of the third-party complaint. On January 10, 1974, the Clerk of the District Court, *sua sponte*, entered a Judgment dismissing both the complaint and the third-party complaint. (A. 4) These appeals followed.

Statement of Facts

1. The Automobile Collision

On November 7, 1969, in Poughkeepsie, New York, a 1966 Ford automobile driven by the plaintiff, Francesco Cordaro, and owned by his wife, collided with a 1968 Chevrolet station wagon, operated by the defendant, Richard H. Lusardi, and owned by his employer, the National Park Service, within the Department of the Interior, an agency of the United States of America. (A. 7, 49)

At the trial, plaintiff Francesco Cordaro was his only witness on the question of liability. Even making the most generous allowance for the plaintiff's difficulty with understanding and speaking English,* the Court found Cordaro

* Plaintiff's counsel could have moved for the appointment of an interpreter if he thought that his witness could not effectively testify in English. Fed. R. Civ. P. 43(f). The Court had
[Footnote continued on following page]

careless and inattentive during the critical moments immediately preceding the automobile accident of November 7, 1969. Despite the fact that the plaintiff had driven down Bement Avenue through the intersection of Bement and Harrison Street in the City of Poughkeepsie, five days a week every week at about the same time of day (shortly before 5:00 P.M.) for a period of seven to eight years prior to the day of the accident (Tr. 45-46), he did not know the speed limit on Bement Avenue (Tr. 18). Nor did he know how fast he was driving on Bement for the two and one-half blocks prior to the accident, since he did not look at his speedometer, in fact, paid no attention to it, and could only guess at the speed. (Tr. 18).

Approaching an intersection which he knew to be dangerous, the scene of many accidents before and after his own (Tr. 23-24), Cordaro took no special precautions. At the time of the accident (4:45 P.M. on a November day), the sky was dark, there were no street lights on and it was raining heavily. (Tr. 6, 8, 106) It is doubtful that he even looked to his left or his right before plowing into the Government driver's car.* (Tr. 22) He certainly did not step on the brakes; (Tr. 26-27, 60-61) his testimony is that he "never had a chance to stop" (Tr. 7), and that he did nothing but hold himself prior to the collision. (Tr. 49) This was so, notwithstanding the fact that the store on the corner of Harrison and Bement was so close to the intersection that he knew that drivers coming from the East on

no obligation to make such an appointment. In view of the fact that the court asked the Government to order the minutes of the trial (Tr. 6), did not render a decision until after the transcript was provided, and admonished counsel to frame easily comprehended questions (Tr. 54), plaintiff was not prejudiced by his language difficulties.

* Plaintiff is in error when he describes the Government car as colliding into his own (Tr. 3: counsel's opening statement; and Brief on Appeal, at 4).

Harrison could not see him coming down Bement from the North; nor could he see them. (Tr. 24; A. 61, Ex. J) Whatever speed he was driving, it was a constant regardless of time or weather conditions. (Tr. 60) There is also the frightening implication in Cordaro's testimony that he was driving down Bement Avenue on the wrong (left) side of a two-way road. (Tr. 50-51) Finally, it should be noted that it was Cordaro's car that struck the side of the Government driver's car, and that plaintiff therefore had the last opportunity to avoid the collision.

The Government driver, Richard H. Lusardi, was returning from a trip to the Dutchess County Highway Department, in the eastern section of the City of Poughkeepsie, to the Vanderbilt Historic National site in Hyde Park, New York, immediately to the north of Poughkeepsie. (Tr. 103) Lusardi was driving in a westerly direction along Harrison Street at 15 m.p.h., a lawful and safe rate of speed. (Tr. 106) He had his low lights and windshield wipers on. (Tr. 107) The right side of the Government car was approximately four feet from the northern curb of Harrison Street (Tr. 110), which was where it properly belonged.

When Lusardi approached the intersection of Harrison Street and Bement Avenue, he did not see the stop sign on Harrison and continued, without halting, into the intersection. When he returned to the scene of the accident, he realized that the reason he had not seen the stop sign was that it was obscured by three parking signs that were located approximately sixteen feet east of the stop sign and closer to the curb (Tr. 115); in addition, he noted that the stop sign was not reflectorized. (Tr. 126) The conditions were aggravated by the absence of natural light or street lighting, but as the Government's photograph indicates (Ex. I, A. 60) the stop sign would have been equally obscured in bright daylight. Lusardi candidly admitted that he did not recall whether the parking signs *registered* in his mind just prior to the accident. (Tr. 128-129) As he was not looking

for a parking place, the parking signs were inconsequential for his purposes. Further, Lusardi had no reason to suspect the hazardous potential of the parking signs, since it was only after the accident that he learned what lay behind them. Also, as he was not familiar with the streets of Poughkeepsie (Tr. 126), Lusardi cannot be charged with constructive knowledge of the hidden stop sign. This is entirely consistent with Lusardi's further statement that Harrison appeared to be one continuous street (Tr. 120), uninterrupted by a cross-street. Without natural light, street lighting or a conspicuous traffic-control signal, there was nothing that should have triggered Lusardi's perception of Bement Avenue.

Lusardi first saw plaintiff's car lights when he (Lusardi) was in the middle of the intersection. Unlike plaintiff, whose testimony demonstrates that he panicked under pressure, Lusardi attempted to avoid the accident by turning to his left and breaking. (Tr. 108). These efforts were unavailing and the collision ensued.

2. Administrative Proceedings

On or about November 17, 1969, plaintiff's insurer, the United Security Insurance Company, entered into a correspondence with the Department of Interior relating to the alleged responsibility of the defendant's employer for the accident, which had occurred ten days earlier. (Tr. 88) On March 25, 1971, after considerable correspondence, the parties reached an accord, under which the Department of the Interior agreed to pay to the plaintiff and his insurer the sum of \$554.11 in exchange for their execution of a general release. The amount was expressly stated to be for property damage to plaintiff's car; no claim for personal injuries was asserted or reserved. The release was incorporated in a form captioned "VOUCHER FOR PAYMENT UNDER FEDERAL TORT CLAIMS ACT". (A.

30) A provision therein under the heading "ACCEPTANCE BY CLAIMANT" reads in its entirety as follows:

"I, the claimant, do hereby accept the within-stated award, compromise, or settlement as final and conclusive on me, and agree that said acceptance constitutes a complete release by me of any claim against the United States and against the employees of the Government whose act or omission gave rise to the claim, by reason of the same subject matter."

Cordaro testified that he signed the release at the office of his attorney, Marshall Brenner, Esq., only after the terms of the release had been read to him. (Tr. 33) Under the most sympathetic questioning by the Court, Cordaro indicated that he was not sure whether he was releasing his personal injury or property damage claim by signing the release, although he recalled that his attorney advised him that the money he received was to be used to fix his car. (Tr. 35-36).

It was not until five days *after* the release dated March 25, 1971, that the Department of Interior received its first communication from a representative of plaintiff referring to a personal injury claim. (Tr. 88) Although Mr. Brenner's letter referred to an antecedent claim, he further stated that he had "finally learned to whom [he] should address correspondence in an attempt to get this matter settled." (Ex. C *) In response to Mr. Brenner's inquiry, counsel for the Department of the Interior sent a letter dated April 1, 1971, enclosing SF-95 (the standard administrative claim form) and directing plaintiff's attorney's attention to the statutory requirement of submission of such a claim as a prerequisite to suit. (Ex. D) Prior to transmitting the April 1 letter, the Department of Interior

* Certain trial exhibits were inadvertently omitted from the Appendix, but are described in a stipulation of counsel. (A. 57).

had not received any personal injury claim from Cordaro, his insurance carrier or his lawyer. (Tr. 91)

No further communications from or on behalf of Cordaro were received by the Department of the Interior until July 17, 1972, when a letter was received, dated July 14, 1972, enclosing a copy of a personal injury claim form itself bearing the date March 21, 1971.* (Ex. E) In the July 14 letter plaintiff's counsel alleged that the claim form dated March 21, 1971, had been sent within two years of the accident. Affixed to the copy of the standard form 95 claim were copies of medical documents bearing dates in December of 1971. By letter of July 17, 1972, counsel for the Department of the Interior asked Cordaro's counsel for proof of timely filing. (Tr. 93; Ex. F) No response to that inquiry was ever received. In opposition to the motion to dismiss, plaintiff introduced by affidavit a copy of a letter dated April 9, 1971,** purporting to be the covering correspondence for the submitted claim form. (A. 36) That letter was never received by the Department of the Interior. (Tr. 93).

Counter-Statement of the Issues

1. Did the District Court correctly hold that plaintiff was contributorily negligent and that his negligence was a complete bar to recovery?

2. Should the District Court have held alternatively that the Government was without liability because of the non-negligence of its driver?

* March 21, 1971 was a Sunday; plaintiff testified that he never visited his attorney on a Sunday. (Tr. 42).

** Although his testimony was somewhat equivocal on the point, plaintiff further testified that the one page claim form was attached to several further documents, presumably the supporting medical documents, at the time he signed the form. (Tr. 41) April 9, 1971 was Good Friday.

3. Should the District Court have dismissed the action in the alternative as prematurely filed, pursuant to 28 U.S.C. § 2675(a), where the action was started prior to either a rejection of the administrative claim for personal injuries or the expiration of six months from the receipt of the claim?

4. Should the District Court have dismissed the action in the alternative on the ground that the general release executed on March 25, 1971 barred subsequent claims for personal injuries?

5. Should the District Court have found that the Government driver's failure to stop at the intersection where the collision occurred was proximately caused by the negligence of the City of Poughkeepsie in the arrangement of its traffic and parking signs?

ARGUMENT

POINT I

The District Court correctly dismissed plaintiff's complaint because of plaintiff's contributory negligence, and could alternatively have dismissed the action on the basis of the non-negligence of the Government driver or on procedural grounds.

A. Plaintiff's Contributory Negligence

Since the District Court dismissed the complaint because of plaintiff's contributory negligence (Finding of Fact No. 25, Conclusions of Law Nos. 2-4) (A. 52), the threshold question is the scope of review on appeal. As this court has recently held:

"The standard of review to be applied to a district court's finding of negligence is not the 'clearly error-

eous' standard . . . for a finding of negligence is reviewable as a matter of law. Nevertheless, the lower court finding '[will] ordinarily stand unless the [lower] court manifests an incorrect conception of the applicable law.'" [citations omitted.]

Whelan v. Penn Central Company, 503 F.2d 886, 892 (2d Cir. 1974). See also, *Nye v. A/S D/S Svendborg*, 501 F.2d 376, 380-381 (2d Cir. 1974) and *Dinnerstein v. United States*, 486 F.2d 34 (2d Cir. 1973). Consideration will first be given to the applicable legal criteria for negligence generally and contributory negligence in particular. Later, we will examine the specific findings upon which the District Court reached its conclusions on the negligence questions in the case.

All parties agree and Judge Gurfein held that the law of New York applies to the tort liability issues. Plaintiff argues on appeal that the District Court misunderstood New York law and thereby rendered a verdict against the weight of the evidence. Neither part of his argument is convincing.

"In an action based on negligence, the contributory negligence of the plaintiff is a complete defense." Harper & James, *The Law of Torts* (1956) § 22.1 (p. 1193). This fundamental principle in most common-law jurisdictions is still recognized in New York State, whose laws govern the substantive questions of liability in a Federal Tort Claims Act suit. 28 U.S.C. § 2674. " * * * [I]f the plaintiff's negligence in any degree contributes to cause the accident, that is sufficient to bar recovery." *Bacon v. Celeste*, 292 N.Y.S. 2d 54, 56, 30 A.D. 2d 722 (1st Dept. 1968). Accord, *Siegelman v. Truelson*, 331 N.Y.S. 2d 858, 39 A.D. 2d 722 (2d Dept. 1972). The plaintiff's failure to conform his conduct to the standard of an ordinarily prudent man in like circumstances justifies a finding of contributory negligence. *Arrigo v. Conway*, 319 N.Y.S. 2d 923, 36 A.D. 2d

215 (4th Dept. 1971). While the question of contributory negligence is generally for the trier of facts, as occurred below, there are instances in New York where the plaintiff's disregard of a known danger may preclude liability as a matter of law. *Winnick v. New York State Elec. & Gas Corp.*, 326 N.Y.S. 937, 38 A.D. 2d 623 (3d Dept. 1971) (riding snowmobile in dark near guy wire, held negligent per se).

Dole v. Dow Chemical Co., 30 N.Y. 2d 143 (1972), which established a rule of comparative negligence between defendant and third-party defendant, neither diminishes the plaintiff's burden of proof nor abrogates the defense of contributory negligence. Although predictions of the demise of the defense of contributory negligence in New York have been widespread since *Dole*, see, e.g., *Sorrentino v. United States*, 344 F. Supp. 1308 (E.D.N.Y. 1972), prevailing authority is to the contrary. Cf., *Codling v. Paglia*, 32 N.Y. 2d 330, 334-335 (1973), *East Hampton Dewitt Corp. v. State Farm Mut. A. Ins. Co.*, 490 F.2d 1234, 1238-9 (2d Cir. 1973), *Bass v. Firestone Tire and Rubber Co.*, 497 F.2d 1223 (2d Cir. 1974). Not surprisingly, the defense of contributory negligence continues to bar recovery by New York plaintiffs suing under the Federal Tort Claims Act. *Moloney v. United States*, 354 F. Supp. 480, 483 (S.D.N.Y. 1972) (post-*Dole*).

Plaintiff's principal authority, *Wartels v. County Asphalt, Inc.*, 29 N.Y. 2d 372 (1972) is simply not to the contrary; having been decided on January 12, 1972, prior to *Dole v. Dow Chemical Co.*, *supra*, it could not stand for a "softening" of plaintiff's burden of proof any greater than that recognized in *Dole*. In *Wartels*, *supra*, "[t]he critical nature of the issue of contributory negligence is emphasized by the fact that the other elements in the case preponderate so heavily in plaintiff's favor." 29 N.Y. 2d at 375. Nothing could be further from the facts at bar. In *Wartels*, by contrast, plaintiff driver struck a flatbed truck that was illegal-

ly stretched across the entire width of the New York State Thruway early in the morning. What reduced plaintiff's burden of proving freedom from contributory negligence to the "vanishing point" were "the highly dangerous condition created by a negligence in an excessive degree which posed a sudden, not to be anticipated peril", 29 N.Y. 2d at 380, and the fact that plaintiff was rendered amnesiac by the accident (*id.*).

Here, the plaintiff was inattentive and careless under circumstances in which he had every reason to be particularly cautious and prudent. The Government driver tried to act carefully under the circumstances; he certainly did not knowingly create grave risks, nor was the peril that he posed unforeseeable by plaintiff. Even if this court accepts the District Court's finding that Lusardi was negligent in failing to note the obscured stop sign, his negligence was hardly so "excessive" as to reduce plaintiff's burden of proof. Additionally, plaintiff was able to testify in his own cause; that his testimony was ineffective and confusing is not the fault of the court or opposing parties.*

Once this court is satisfied that Judge Gurfein correctly understood the governing principles of negligence in this case, its task is considerably narrowed. The district court's

* The district court could properly have granted the motions to dismiss at the close of plaintiff's case for his failure to prove any act of negligence by Lusardi. Instead, decision was reserved. In the absence of a jury and in the interests of providing the court with a complete picture of the facts, including the Government's case against the City of Poughkeepsie, the Government called Lusardi as a witness. His testimony must therefore also be considered in reviewing the question of whether the case should have been dismissed. 9 Wright & Miller, *Federal Practice and Procedure* (1971) § 2371 at 211 n. 44 and cases cited therein. Thus, the issue of whether the plaintiff made out a *prima facie* case becomes merged in the general review of the correctness of the District Court's findings of fact and conclusions of law, and will not be separately treated here.

specific findings of fact are to be upheld unless they are "clearly erroneous." Rule 52(a), Fed. R. Civ. Proc., a standard of review long recognized in Federal Tort Claims Act suits: *Blaber v. United States*, 332 F.2d 629 (2d Cir. 1964) (test applied to proximate cause finding); *Fuchstadt v. United States (I)*, 434 F.2d 367 (2d Cir. 1970) (test applied to findings as to speed and direction of government car); *Fuchstadt v. United States (II)*, 442 F.2d 400 (2d Cir. 1971) (test applied to computation of damages).

Plaintiff attacks only one finding by the district court, namely that he failed to look to the left as he approached the intersection of Harrison Street and Bement Avenue. (A. 52; Finding of Fact No. 25). But there is more than ample support in the record for the finding. Early in the direct case, the court interrupted the examination of plaintiff and elicited what was, at best, an ambiguous response (Tr. 8):

"The Court: Did you look to the left and right before you crossed that street?

The Witness: Yeah. I was watching. It happened so fast I never got—I don't know."

On cross-examination, counsel was no more successful than the court in pinning down plaintiff's response. Surely, where the plaintiff testified first that he "looked straight ahead", corrects his testimony to state that he "was looking left and right" only after he believes that he would appear to be a "dummy" were he to adhere to his original response (Tr. 22), and where the plaintiff repeatedly testified that he first viewed Government car when it was directly in front of him (Tr. 55), the district court was justified in concluding that the plaintiff driver did not look to his left before entering the intersection where the accident occurred.*

* It is perfectly apparent that Judge Gurfein disbelieved Cordaro when, from time to time, with the assistance of counsel, he
[Footnote continued on following page]

There is therefore scant room for argument with the court's finding that plaintiff was careless in at least this one critical respect. See, *Moloney v. United States*, 354 F. Supp. 480, 483 (S.D.N.Y. 1972).

Plaintiff does not dispute the court's findings that the intersection was "blind" and that plaintiff was well aware of its dangers (A. 48, Findings of Fact Nos. 12-13). Consequently, if this court agrees that there was support in the record for the finding that plaintiff did not look to his left as he entered the intersection, it follows that plaintiff's contributory negligence was a proximate cause of the automobile collision in which he was injured. Even if Cordaro had looked to his left before reaching Harrison Street, his conduct was in other respects so careless, in view of all the circumstances, that the finding of contributory negligence was appropriate. His complaint was therefore properly dismissed.

B. Lusardi's Alleged Negligence

If this court should determine that plaintiff's contributory negligence proximately caused, in whatever degree, the subject accident, there would of course be no need to consider the question of the negligence of the Government driver, Richard Lusardi. Assuming *arguendo* that the finding as to Francesco Cordaro's contributory negligence is reversed, the Government submits that this court should hold that the District Court erred in Finding of Fact No. 23: "There is no explanation for Lusardi not seeing the stop sign other than the rainy weather and darkness or Lusardi's inattention." (A. 52).

was able to frame responses that helped his cause. The District Court obviously credited his initial, spontaneous replies, which tended either to confirm the defendant's version of the accident or were so garbled as to be meaningless. Consider, e.g., the colloquy over whether plaintiff was driving on the right or left side of Bement Avenue. (Tr. 49-52)

First, the Government concedes that the same narrow standard of review applies to the finding it contests as applies to the findings that were adverse to Cordaro. Second, the Government would further concede that if the District Court had stated that it disbelieved Lusardi's testimony, it would have placed its determination that Lusardi was negligent virtually beyond appellate review. Third, if this issue hinged entirely on the resolution of two conflicting passages in Lusardi's testimony, the Government would not deny the power of the trier of the facts to place greater credence in one passage than in another. But Finding of Fact No. 23 is predicated upon a disregard of uncontradicted testimony and photographic evidence, which this Court is in as good a position as the District Court to evaluate. *Cf., Orvis v. Higgins*, 180 F.2d 537, 538 (2d Cir.), *cert. denied*, 340 U.S. 810 (1950), *United States ex rel. Lasky v. LaVallee*, 472 F.2d 960, 963 (2d Cir. 1973).

There was support in the record for the district court's findings that Lusardi thought he was driving down one continuous street and that he did not realize he had entered an intersection until he saw Cordaro's headlights to his right. (Tr. 112, 120) (A. 51-52) There was nevertheless an explanation for Lusardi's failure to perceive the cross-street that did not require the supposition that he was inattentive.* On a dark and rainy November after-

* It is important to note what the district court did *not* hold. Judge Gurfein found Lusardi "inattentive" and his conduct therefore negligent; he did not rule that since Lusardi had violated a traffic control law enforced by the City of Poughkeepsie, he was *per se* negligent. The district court could not have held Lusardi negligent on such a ground because not all violations of traffic control regulations are culpable. Section 1110(b) of the Vehicle and Traffic Law, which provides that:

"No provision of this title for which signs are required shall be enforced against an alleged violator if at the time and place of the alleged violation an official sign is not in proper position and sufficiently legible to be seen by an ordinarily observant person. * * *

noon, with the benefit of only his headlights, travelling along unfamiliar roads, Lusardi simply did not see the stop sign, the one feature in his field of vision that could have alerted him to the presence of cross traffic. Lusardi testified, and there was no testimony to the contrary, that the reason he did not see the stop sign, as he ultimately discovered, was that it was obscured by three parking signs and not reflectorized. (Tr. 115, 126) Finally, Lusardi was shown at trial two photographs taken from different vantage points along Harrison Street and asked to state which correctly reflected his field of vision immediately prior to entering the intersection with Bement Avenue. He unequivocally selected Ex. I (A. 60), which vividly demonstrates the hazard created by the City of Poughkeepsie. Given his candor on other points damaging to the Government's case, there was no reason not to credit this statement.

The Government does not deny that Lusardi's act of running the stop sign was a proximate cause of the collision; but it assigns as error the District Court's finding that Lusardi's conduct was negligent. We invite this Court to review the photographic evidence and uncontradicted testimony *de novo* and to hold that it was the confluence of several factors beyond Lusardi's control—the weather, lighting and arrangement of traffic and parking signs—that were the operative causes of the missed stop sign. If this court so holds, it may affirm the dismissal of the complaint without regard to Cordaro's contributory negligence.

C. The Prematurity of the Suit

In its motions to dismiss before trial and at the close of plaintiff's case at trial, the Government made two inter-related arguments regarding the administrative claim provisions of the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.* First, the Government argued that plaintiff had not complied with 28 U.S.C. § 2401(b), in that he had failed to present his administrative claim within two years of the

time when the claim accrued. Like the related provision, 28 U.S.C. § 2675(a), this section is jurisdictional and cannot be waived. *Hoch v. Carter*, 242 F. Supp. 863 (S.D.N.Y. 1965). Cf., *Bialowas v. United States*, 443 F.2d 1047 (3rd Cir. 1971); *Gutelius v. United States*, 312 F. Supp. 51 (E.D. Va. 1970); and *Driggers v. United States*, 309 F. Supp. 1377 (D.S. Car. 1970). The accident having occurred on November 7, 1969, and no administrative claim for personal injuries having been received by the Department of the Interior until July 17, 1972, the Government contended that the suit against it was time-barred at its commencement. The District Court ruled that it would reserve on the question of the timeliness of the claim pending its determination of the issue of tort liability. (Tr. 16). Accordingly, we will not press this argument but merely note that if the judgment below is reversed, the record will have to be reopened not only for the question of damages, if any, but also preliminarily for proof of compliance with the administrative claim provisions of the Act.*

Second, the Government urged that the complaint should be dismissed for prematurity. Plaintiff was required under 28 U.S.C. § 2675(a) to have presented an administrative claim to the appropriate federal agency and to await its denial or the expiration of six months before commencing an action in court. Department of Justice regulations make clear that the claim is "presented" when the appropriate federal agency receives the Standard Form 95 with a claim for money damages, not when the claim is sent. 28 C.F.R.

* With deference, the Government also believes that the District Court erred in permitting the plaintiff to "prove" compliance by affidavits submitted in opposition to a pre-trial motion to dismiss (Tr. 77-85). See, Rule 43(a), Fed. R. Civ. Proc., *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946) (reversing summary judgment granted in partial reliance on disputed statements in depositions); *Locklin v. Switzer Bros., Inc.*, 348 F.2d 244 (9th Cir. 1965). It was plaintiff's burden to call such witnesses as could establish the jurisdictional facts in dispute prior to concluding his case in chief.

§ 14.2. Presentation of such claims by registered or certified mail is all that this regulation requires of a prudent plaintiff. The uncontradicted testimony at trial was that plaintiff's claim for \$100,000 for personal injuries was first received by the Department of the Interior on July 17, 1972. (Tr. 93). The claim had not been denied nor had six months elapsed by the time of the inception of the action. Indeed, no administrative consideration of the claim was possible since Lusardi was served with a summons on July 12, 1972. Having filed his administrative claim too late, plaintiff thereupon instituted suit too soon. On the latter ground alone, the complaint should have been dismissed.* *Caton v. United States*, 495 F.2d 635 (9th Cir. 1974).

The District Court never addressed itself to this contention. The point may seem technical, but it is worth stressing that without the administrative claim procedure the federal courts would be flooded with negligence litigation.

*It may be urged that the question of prematurity should not be reached until after the District Court, on remand, conducts a hearing with respect to the timeliness of the presentation of the administrative claim. That contention should be flatly rejected. Even if the district court were to conclude that plaintiff did attempt to comply with the two-year presentation of claim requirement contained in 28 U.S.C. § 2401(b) (see, A. 32-36), that would still not cure plaintiff's problem. Perhaps if he had begun suit against the United States more than six months after the alleged submission of the claim on April 9, 1971, but prior to the resubmission of the claim on July 14, 1972, he could enjoy the benefit of the presumption of receipt adverted by Judge Gurfein on the pre-trial motion to dismiss. (A. 42) But having submitted a copy of his claim form in July of 1972 and having been informed by counsel for the Department of the Interior that no prior claim had been received, it is difficult to understand why plaintiff should then be relieved of the obligation of awaiting the outcome of the standard administrative process. Inasmuch as a substantial portion of his property damage claim was paid by the federal agency, plaintiff cannot say that the statute required him to undertake a "futile" act (submission of a claim for personal injuries for administrative review), whose omission can thus be excused.

tion. For example, one regional office of the Department of the Interior receives three to four administrative claims (standard form 95) *per day*. (Tr. 97) Congress has decided that agencies require six months to process such claims and that courts should decline to adjudicate such disputes during that period. 28 U.S.C. § 2675(a). If the six-month rule could be circumvented by actions against Government drivers * in state court, the district courts would be overwhelmed with cases that are generally unworthy of its time and resources. See, Friendly, *Federal Jurisdiction: A General View* (1973) 133-137. Because of the compounding of procedural problems in this suit and the absence of merit in the plaintiff's claim, this court should insist upon strict adherence to the six-month consideration of claim requirement of 28 U.S.C. § 2675(a), measured from the date of "presentation" of the claim, as that term is glossed in 28 C.F.R. § 14.2. *Caton v. United States*, 495 F.2d 635 (9th Cir. 1974), *Bialowas v. United States*, 443 F.2d 1047 (3rd Cir. 1971).

D. The Release

On March 25, 1971, after plaintiff's insurer, United Security Insurance Co., reached an agreement with the Department of the Interior concerning plaintiff's claim, plaintiff and his insurer executed a general release of all claims arising out of the collision of November 7, 1969 in consideration for the payment of \$554.11. (A. 30) Plaintiff had previously reviewed the release with his counsel. (Tr. 35-36) The description of the award was concededly only for the property damage to plaintiff's car but, at the time of the execution of the release, that was the only

* That plaintiff did not really believe he had an independent right of action against Lusardi personally is shown by (1) his acceptance of an award of money from the Government for property damage to his car (A. 31), and (2) the description of the defendant's employment and capacity in his complaint (A. 7).

claim plaintiff had presented to the federal agency.* The issue is therefore whether plaintiff waived his right to sue for alleged personal injuries flowing from the subject collision by reason of the general release.

The district court agreed with the Government on the pre-trial motion to dismiss that, if federal law governed, the general release would prevail over any reservations of right that might be inferred from the description of the "award of claim." *Huber v. United States*, 244 F. Supp. 537 (N.D. Cal. 1965), *Wexler v. Newman*, 311 F. Supp. 906, 907 (E.D. Pa. 1970). (A. 43). But the District Court went on to hold that state law controlled on the question of the effect to be given the release, relying upon *Montellier v. United States*, 315 F.2d 180, 184-185 (2d Cir. 1963). It further ruled that under New York law parole evidence could be introduced at trial to determine the scope of the release. (A. 43-47).

Notwithstanding this court's decision in *Montellier v. United States*, *supra*, which involved a release given without consideration, prior to the accident, and thus not, as here, in settlement of a claim arising under the Federal Tort Claims Act, there exist sound reasons for enforcing a uniform rule with regard to post-accident releases of administrative claims. Alternatively, plaintiff's release should have been deemed effective under New York law. On the first point, the statutory language could not be clearer. 28 U.S.C. § 2672 provides in relevant part that:

"The acceptance by the claimant of any such award, compromise or settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and

* Assuming for the sake of argument that plaintiff did "present" his claim for personal injuries by means of the letter identified as Ex. G. (A. 36), the claim would not have arrived at the Department of the Interior until after April 9, 1971, the day plaintiff's counsel purportedly mailed the claim for personal injuries.

against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter."

There is no reason why this provision, which is incorporated verbatim in all releases, should have varying effect depending on the state in which it is signed by the claimant. Moreover, the majority view is that a single wrongful act or omission causing damage to both the person and property of an individual gives rise to but a single cause of action with separate items of damage. 62 A.L.R. 2d 977 (1959). As a general matter, "[t]he rule against splitting causes of action is a salutary one. In the absence of some statutory mandate to the contrary, the alleged wrongdoer should not be put twice to his defense on the same cause of action." *United States F. & G. Co. v. Graham & Norton Co.*, 254 N.Y. 50, 55 (1930). See also, *Manko v. City of Buffalo*, 294 N.Y. 109, 111, 60 N.E. 2d 828 (1945), and *Millington v. Southeastern Elevator Co.*, 22 N.Y. 2d 498, 508 (1968) (dictum).

But assuming that New York law governs and that, despite the foregoing general principle, it does not bar a division of personal injury and property damage claims growing out of the same operative facts, *Reilly v. Sicilian Asphalt Co.*, 170 N.Y. 40, 62 N.E. 772 (1902), the question remains whether plaintiff proved at trial that the release was not intended to be general.* In the absence of clear and unequivocal testimony that plaintiff's purpose in signing the release was merely to settle the property damage claim, and with no notice having been given to the

* Plaintiff has never argued that he did not discover his personal injuries until after he had signed the release; consequently, the burden is upon him to show mutual mistake or some other ground for disregarding the generality of language in release. *Mangini v. McClurg*, 24 N.Y. 2d 556, 563, 249 N.E. 2d 386 (1969).

Department of the Interior of the existence of a personal injury claim until *after* the execution of the general release, it would not be unequitable to leave plaintiff with the bargain that he struck. Such relief would be particularly appropriate where, as here, plaintiff reviewed the release with the assistance of counsel (Tr. 35-36) and yet failed to note on the release any reservation of a right to make a separate claim for personal injuries. *See, Lucio v. Curran*, 2 N.Y. 2d 157, 161, 139 N.E. 2d 133 (1956). The Government is entitled to know when it agrees to pay a minor property damage claim that it has not thereby invited a \$100,000 personal injury suit from the same claimant for the same acts.

This court need not reach the question of the scope of the release unless it holds against the Government on the issues of Cordaro's contributory negligence, Lusardi's alleged negligence and the prematurity of the litigation. But if the issue is reached, the Government asks that the Court examine the question primarily as one turning on the divisibility of plaintiff's claim. It should hold that a settlement under 28 U.S.C. § 2672 forecloses further litigation arising out of the same claim.

POINT II

Since the negligence of the City of Poughkeepsie in the arrangement of its traffic and parking signs was the proximate cause of Lusardi's failure to stop at the intersection, the third-party complaint should not have been dismissed.

The District Court held that the Government driver acted negligently in failing to stop before entering the intersection of Harrison Street and Bement Avenue. (Finding of Fact No. 24, Conclusion of Law No. 1; A. 52). In his Conclusions of Law, however, Judge Gurfein did not hold that

the third-party complaint should be dismissed. Nonetheless, the Clerk of the district court, on his own motion, entered a Judgment that dismissed not only Cordaro's complaint but also the Government's third-party complaint. (A. 4) A protective notice of cross-appeal was therefore filed. The argument that follows assumes that the Clerk below did not exceed his authority in dismissing the third-party action and that this court will reverse the dismissal of Cordaro's complaint, notwithstanding the arguments made in Point One, *supra*.

Since New York State waived its sovereign immunity with respect to tortious acts committed by its servants by the passage of the Court of Claims Act, it has been held liable for "failing—by signs adequate in number and placement, and appropriate in design—to give a timely warning to the driver of the ill-fated car that he was approaching a segment of [the road] where lurked uncommon danger," *Canepa v. State of New York*, 306 N.Y. 272, 277, 117 N.E. 2d 550 (1954). See also *Grunai v. State of New York*, 136 N.Y.S. 2d 238, 206 Misc. 984 (Ct. Cl. 1954), *aff'd*, 286 A.D. 1145, 146 N.Y.S. 2d 709 (4th Dept. 1955) (State negligent where traffic sign obscured by underbrush). Lusardi's testimony is clear that his perspective as the driver of the Government car is best represented by Ex. I (Tr. 148), which photograph shows the danger inherent in the arrangement of parking and traffic signs at Bement Avenue and Harrison Street. Lusardi ran the stop sign, not only because he did not see it, but also because he could not have seen it in time to halt before reaching the intersection.

Even the plaintiff acknowledged that the intersection was dangerous and that there had been many collisions there prior and subsequent to his accident (Tr. 23-24). Only the City of Poughkeepsie seems to doubt that it has created a trap for the unwary; and its proof, consisting of

photographs taken from positions that are irrelevant * for the purposes of this action, is wholly unpersuasive.

In *Dole v. Dow Chemical Co.*, 30 N.Y. 2d 143 (1972), the Court of Appeals of the State of New York held that a defendant in a negligence action may implead a joint tortfeasor and that the trial court might apportion the damages between them in accordance with their relative responsibility for the injury to plaintiff. This rule has been applied to Federal Tort Claims Acts suits as well as private actions. *Sorrentino v. United States*, 344 F. Supp. 1308 (E.D.N.Y. 1972). The implications of *Dole* for this appeal are clear: If this court were to reverse the dismissal of the complaint against the United States and remand for further proceedings, it should also direct the district court to apportion the liability between Poughkeepsie and the Government in accordance with their respective responsibility for the injuries allegedly suffered by plaintiff. In this event, the district court will first have to rule on the Government's motion to strike Poughkeepsie's affirmative defense regarding the failure of the Government to submit a pre-accident notice of defect.

* Poughkeepsie's photographs (Exs. K, N, O, and P) would have some bearing on the case if Lusardi had been driving down the middle of Harrison Street in a truck with an elevated seat. But the perspective in those photographs is so misleading that they have no probative value.

CONCLUSION

For the reasons outlined in Point One, *supra*, the decision of the district court should be affirmed. In the event that the judgment of the district court is reversed, the case should be remanded for the receipt of further evidence on the question of the timeliness of the presentation of the administrative claim and the damages suffered by plaintiff. Also, for the reasons given in Point Two, *supra*, if the complaint in the principal action is reinstated, then the judgment below should be reversed in all respects and the third-party complaint reinstated, with directions to apportion such judgment, if any, as the plaintiff may be awarded between the defendant, United States of America, and the third-party defendant, City of Poughkeepsie, to reflect their respective responsibility for the injuries allegedly suffered by plaintiff.

Respectfully submitted,

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February, 1975

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AFFIDAVIT OF MAILING

CA 74-1347,
CA 74-1349

State of New York)
County of New York)

Pauline Troia,
being duly sworn,
deposes and says that she is employed in the Office of the
United States Attorney for the Southern District of New York.

That on the 6th day of
February 1975 she served ~~2~~ ^{2 copies} copy of the within
brief for deft's appellees and 3rd pty pltfs applt's.

by placing the same in a properly postpaid franked envelope
addressed:

- 1) Robert B. Dietz, Esq., Corp. Counsel, City of Poughkeepsie, City Hall
Poughkeepsie, NY 12601
- 2) Marshall L. Bremer, Esq., 35 Market St. Poughkeepsie, NY 12601

And deponent further says
s he sealed the said envelopes and placed the same in the
mail chute drop for mailing in the United States Courthouse,
Foley Square, Borough of Manhattan, City of New York.

Pauline Troia

Sworn to before me this

6th day of February 1975

Walter G. Brannon
WALTER G. BRANNON
Notary Public, State of New York
No. 24-0394500
Qualified in Kings County
Cert. filed in New York County
Term Expires March 30, 1975